

**F & A Food Sales, Inc. and International Association of Machinists and Aerospace Workers, AFL-CIO.** Case 17-CA-18391

March 27, 1998

**DECISION AND ORDER**

BY MEMBERS FOX, HURTGEN, AND BRAME

On August 1, 1997, Administrative Law Judge Lawrence W. Cullen issued the attached bench decision (with an App. A) in this proceeding. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, to amend the remedy,<sup>1</sup> and to adopt the recommended Order as modified.<sup>2</sup>

The Respondent terminated its drivers and driver's helpers in February 1994, closed its transportation department, and subcontracted the work, with the Union's agreement. On August 20, 1995, the Respondent again took over the operation of the transportation department and hired drivers and driver's helpers.<sup>3</sup> The Respondent thereafter refused to recognize and bargain with the Union as the bargaining representative of these employees.

The judge found, and we agree, that when the Respondent restored its transportation department and hired the subcontractor's employees as drivers and helpers, these employees were covered by the unit description in the existing collective-bargaining agreement's recognition clause, and by the certification. This case is distinguishable from *Coca-Cola Bottling Co. of Wisconsin*, 310 NLRB 844 (1993). In that "unit

clarification" case the Board refused to include a production classification in the bargaining unit although the classification had been included when the union was certified, and successive bargaining agreements thereafter included the classification in the recognition clause. In that case, however, the union had been certified in 1961 and the employer had ceased production operations in 1980. The employer had no production operations or production employees from 1980 to 1992. The Board found this 12-year hiatus to be controlling. Here, by contrast, the subcontracting of the work, the termination of the drivers and the driver's helpers, and the return of the work and employees in the driver and the driver's helper classifications to the Respondent's operations occurred during the effective period of a single collective-bargaining agreement, and within approximately 3 years of the certification. In these circumstances, the Respondent was obligated to recognize the Union as the representative of the unit employees in its transportation department and to apply the existing contract to them.<sup>4</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, F & A Food Sales, Inc., Concordia, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its facility in Concordia, Kansas copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since August 1995."

<sup>1</sup>In the remedy section of his decision the judge inadvertently cited *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The correct cite is to *Ogle Protection Service*, 183 NLRB 682 (1970).

<sup>2</sup>We have modified the judge's recommended Order in accordance with our decision in *Excel Container*, 325 NLRB No. 14 (Nov. 7, 1997).

<sup>3</sup>The parties stipulated that a majority of the drivers and driver helpers employed by the Respondent at the time it terminated the department went to work for the subcontractor, Ryder Dedicated Logistics, Inc. (RDL). There is no contention that these employees did not constitute a majority of the subcontractor's unit employees, who continued to be based at the Respondent's facility. The parties also stipulated that a majority of the drivers and driver helpers employed by RDL in August 1995 went to work for the Respondent. Again, there is no contention that these employees did not constitute a majority of the Respondent's unit employees. However, of the approximately 20 drivers and helpers hired by the Respondent in August 1995, only 3 had previously been in Respondent's employ.

<sup>4</sup>Because we have found that the disputed classifications are still included in the unit on the basis of the contract's recognition clause and the unit certification, accretion principles have no bearing on this case, and we accordingly do not rely on the judge's discussion of the accretion issue.

Lyn R. Buckley, Esq., for the General Counsel.  
 Anthony J. Powell, Esq. (*Martin, Churchill, Blair, Hill, Cole & Hollander, Chartered*), of Wichita, Kansas, for the Respondent.

## BENCH DECISION

### STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on June 19, 1997, in Concordia, Kansas, pursuant to a complaint filed by the Acting Regional Director for Region 17 of the National Labor Relations Board (the Board) on March 29, 1997, and is based on a charge filed by International Association of Machinists and Aerospace Workers, AFL-CIO (the Union or the Charging Party) and alleges that F & A Food Sales, Inc. (the Employer or the Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing and failing to recognize District Lodge 70 of the Union as the collective-bargaining representative of its drivers and helpers employed by its transportation department and its failure to apply the terms of a labor agreement between the Respondent and Local Union 70. The complaint is joined by the answer of the Respondent filed on April 8, 1997, where it denies the commission of any violations of the Act.

I issued a bench decision on June 19, pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations on the entire record in this proceeding, including my observation of the witnesses who testified, and after due consideration of the trial briefs filed by the parties. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A" the pertinent portion (pp. 131-158) of the trial transcript as corrected and modified by me.

### FINDINGS OF FACT

#### I. JURISDICTION

##### The Business of the Respondent

The Respondent maintains its office and place of business in Concordia, Kansas, where it is engaged in the wholesale purchase and distribution of grocery products and it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION

The International Association of Machinists and Aerospace Workers, AFL-CIO and its District Lodge 70 are labor organizations within the meaning of Section 2(5) of the Act.

#### III. THE APPROPRIATE UNIT

The following employees of the Respondent constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and regular part-time drivers, warehouse employees, fuelers, helpers, and maintenance employees employed by F & A Food Sales, Inc. at its facility located at 2221 Lincoln, Concordia, Kansas, but excluding office clerical employees, sales employees,

guards and supervisors as defined in the Act and all other employees.

### CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. District Lodge 70 of the Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act by its failure and refusal to recognize and bargain with the Union on behalf of its drivers and helpers, and by its failure to apply the terms of its expired September 4, 1993, to September 4, 1996 labor agreement with Local 70 to the drivers and helpers and by the imposition of a unilateral change in the pay of its drivers and helpers.

4. The above unfair labor practices in connection with the business engaged in by the Respondent have the effect of burdening commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### THE REMEDY

Having found that the Respondent has engaged in violations of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes of the Act and post the appropriate notice.

It is recommended that the Respondent recognize and, on request, bargain with District Lodge 70 of the Union on behalf of the employees in the above-described unit including the drivers and helpers in its transportation department. It is further recommended that the Respondent make the aforesaid employees whole for any loss of earnings or benefits sustained by them as a result of the Respondent's failure and refusal to recognize the Union and bargain on their behalf and to apply the terms of the collective-bargaining agreement to these employees in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1982).<sup>1</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

### ORDER

The Respondent, F & A Food Sales, Inc., Concordia, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with District Lodge 70 of the International Association of Machinists and Aerospace Workers, AFL-CIO on behalf of the drivers and helpers in the above-described appropriate unit, and by failing and refusing to apply the terms of the expired September 3, 1993, to September 4, 1996 collective-bargaining agreement between the Respondent and the Union and by unilaterally changing the pay of the drivers and helpers.

<sup>1</sup> Interest shall be computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All regular full-time and regular part-time drivers, warehouse employees, fuelers, helpers, and maintenance employees employed by F & A Food Sales, Inc. at its facility located at 2221 Lincoln, Concordia, Kansas, but excluding office clerical employees, sales employees, guards and supervisors as defined in the Act and all other employees.

(b) Apply the terms of the expired September 4, 1993, to September 4, 1996 collective-bargaining agreement to all of the unit employees including the drivers and helpers until such time as a new agreement is entered into by the parties.

(c) Make the drivers and helpers whole for any loss of earnings or benefits, including seniority they may have sustained as a result of the Respondent's unfair labor practices, with interest, as set out in the remedy.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Concordia, Kansas, copies of the attached notice marked "Appendix B."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the the Respondent's authorized representative, shall be posted by the the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the the Respondent has gone out of business or closed the facility involved in these proceedings, the the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the the Respondent at any time since September 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the the Respondent has taken to comply.

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX A

(pp. 131–151)

ADMINISTRATIVE LAW JUDGE CULLEN: All right. Ladies and Gentlemen, I'm now going to issue a Bench decision in this case having heard the testimony submitted, reviewed the exhibits, and reviewed the memorandums of law and briefs filed by the parties and considered the closing statements of the parties. Initially, I'm going to go through the complaint (several matters are not contested), and read the underlying jurisdictional elements which bring this case before me.

The complaint alleges and it is admitted, and I find, that at all material times herein, that the charge in this proceeding was filed by the International Association of Machinists and Aerospace Workers AFL–CIO on January 8th, 1996, and a copy was served by certified mail on the Respondent on January 11th, 1996. Also the first amended charge in this proceeding was filed by the Union on March 28th, 1996, and a copy was served by certified mail on the Respondent concurrently with this complaint and notice of hearing.

It is also alleged in the complaint and admitted, and I find, that at all material times herein, the Respondent, a corporation with an office and place of business in Concordia, Kansas, herein called the the Respondent's facility, has been engaged in the business of distributing food products, that during the 12-month period ending December 31, 1995, the Respondent, in conducting its business operations, purchased and received at its Concordia facility, goods valued in excess of \$50,000 directly from points outside the State of Kansas, also that during the same 12-month period. The Respondent, in conducting its business operations, sold and shipped from its Concordia facility goods valued in excess of \$50,000 directly to points outside the State of Kansas.

It is also alleged and admitted, and I find, that at all material times herein, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act. The Respondent denies that it has been an employer engaged in commerce within the meaning of Section 2(7) of the Act. However, based on the findings heretofore stipulated to and other stipulations and other testimony and evidence received at the hearing, I find that it has been an employer engaged in commerce within the meaning of Section 2(7) of the Act as well as Section 2(2) and (6).

It is further alleged, admitted, and I find, that at all material times herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act and that the International Association of Machinists and Aerospace Workers, District Lodge 70, AFL–CIO, herein called District Lodge 70, has been a labor organization within the meaning of Section 2(5) of the Act.

It is also alleged, admitted, and I find, that at all material times herein, the following named individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act. And they are Dan Farha, President, Mike Richards, Assistant Transportation Supervisor, and Dennis Strait, Transportation Manager. It is further stipulated and I find that at all material times Dan Farha, President of the Respondent, has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

It is further alleged, admitted, and I find, that the following employees of the Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

All regular full-time and regular part-time drivers, warehouse employees, fuelers, helpers, and maintenance employees employed by F & A Food Sales, Inc. at its facility located at 2221 Lincoln, Concordia, Kansas, but excluding office clerical employees, sales employees, guards, and supervisors, as defined in the Act and all other employees.

It is further alleged that on August 17th, 1992, the Union was certified as the exclusive collective-bargaining representative of the Unit, and this is admitted by the Respondent, and I so find. It is further alleged that since August 17th, 1992, and at all material times, the Union has designated District Lodge 70 as the bargaining representative for the employees in the Unit and that since August 17, 1992, and at all material times, District Lodge 70 has been the designated exclusive collective-bargaining representative of the Unit, and since August 17, 1992, and at all material times, District Lodge 70 has been recognized as the representative by the Respondent. This recognition has been embodied in a collective-bargaining agreement between District Lodge 70 and the Respondent, which was effective from September 4, 1993, to September 4, 1996. It is further alleged, and the Respondent says it is without knowledge, that since August 17, 1992, and at all material times, District Lodge 70 has been the exclusive collective-bargaining representative of the Unit. I find, based on the evidence and testimony herein, that these allegations are as set out herein.

It is further alleged and this is the crux of the issue in the case, that since about late August 1995, the Respondent has withdrawn recognition from District Lodge 70 as the exclusive collective-bargaining representative of the drivers and helpers in the Unit and has failed and refused to recognize and bargain with District Lodge 70 as the exclusive collective-bargaining representative of the drivers and helpers in the Unit and has repudiated the collective-bargaining agreement described above with respect to the drivers and helpers in the Unit, and that by this conduct, it has violated Section 8(a)(1) and (5) of the Act and that the unfair labor practices of the Respondent in this regard affect commerce within the meaning of Section 2(6) and (7) of the Act. I find that the Respondent did, in fact, violate Section 8(a)(1) and (5) of the Act by its withdrawal of recognition, failure to apply the contract, and its refusal to bargain collectively with the Union in this case.

There were a number of stipulations and a number of exhibits were entered through stipulation. Most of the facts are not in dispute and were accordingly stipulated to. With respect to these, General Counsel's Exhibit 2 is the Certification of Representation for the International Association of Machinists and Aerospace Workers, and that is dated the 17th day of August 1992, and is the date that the Charging Party was certified as the collective-bargaining representative of the employees in the appropriate Unit, which I have previously described. A labor agreement was entered into by the parties and that was effective from the 4th day of September 1993, to remain in full force and effect until and including

the 4th day of September 1996. It was signed by the Union and the Respondent in this case. As part of that agreement, article 2, section 1, states that the company recognizes the Union as the sole and exclusive collective-bargaining agent for the Unit of employees certified by the Board on the 17th day of August 1992, in Case 17-RC-10796 and sets out that this agreement covers all regular full-time and regular part-time drivers, warehouse employees, fuelers, helpers, and maintenance employees employed by F & A Food Sales Company, Inc. at its facility located at 2221 Lincoln, Concordia, Kansas, the only facility involved herein, but excluding office clerical employees, sales employees, guards and supervisors as defined in the Act and all other employees. Article 4, entitled Management Rights, section 1 of the labor agreement provides that the company shall retain the right to manage its business, including but not limited to, and it then delineates a number of items, that the company can do as a part of the retention of its management rights. One of these is to close down or move the business or any parts thereof or curtail operations. It can also establish new departments. It can discontinue existing departments, operations, or business in whole or in part, and it can determine the number of employees in each classification. It can introduce new or improved production methods or equipment. And most pertinent to this case, it has retained the right to subcontract, transfer, or relocate work as the company deems necessary or desirable, and to determine the number and location of operations and the services and products to be handled and otherwise generally to manage the operation and direct the working force. It states further that the above rights are not all inclusive but are enumerated by way of illustration as to the type of rights retained by the company and that the company retains all other rights, power, and authority except those which have been specifically abridged, delegated, or modified by this agreement.

A letter dated December 8th, 1993, was sent to Mr. Albert Cook, who was formerly a business representative of the International, who was involved in representation of this particular Unit from the Respondent's President Dan Farha and states that,

Our company has made the decision that we should change the scope and direction of our business by discontinuing our Transportation Department. In early 1994, we plan to out-source our delivery service to a professional, dedicated contract carrier. This carrier plans to accept applications from our current Transportation Department employees. The reasons for this decision include our insurance carrier will be dropping our fleet coverage effective January 6, 1994, due to driver accidents, damage, et cetera. Two, the complexity of Federal Regulations, both Federal and upcoming, have made private fleet operations very difficult to maintain. Three, the expertise that a professional transportation company can provide since they are dedicated to transportation service only. Four, shortage of qualified drivers in Cloud County. Five, our Workers' Compensation insurance carrier will be putting us in assigned risk due to excessive losses. If you have any questions, we need to hear from you by December 13, 1993.

Pursuant to that letter and to discussions between Albert Cook, business representative for the Union, and Dan Farha, president for the company, the parties entered into an agreement dated December 21, 1993, which states:

Pursuant to the parties oral discussion and understanding and previously mailed correspondence, it is hereby agreed that F & A Food Sales, Inc. Company shall subcontract its trucking operations. The International Association of Machinists and Aerospace Workers, AFL-CIO Union agrees that the Company has notified and discussed with the Union the subcontracting of its trucking operations and that the Union does not object to the subcontracting of the Company's trucking operations.

Now, that is in one form of type. Immediately following that, the word operations, is a comma and it says: "Due to the current contract language" and this is dated December 21, 1993. Now, President Farha noted the differences in the type and testified that he did not recall how that came to be, or who had added the comment "due to the current contract language." Cook testified that upon learning of the request from Farha, he checked with the business manager to whom he reported, and they reviewed the contract, and that upon review he (Cook) questioned Farha as to why the Respondent needed this particular agreement as it was his understanding that the company had the authority to subcontract this work out in any event and did not need an additional agreement to do so. However, he signed the agreement but before he signed, he added the words "due to the current contract language."

The subcontractor in this case was part of the Ryder operation and was referred to as RDL throughout the proceeding, and it took over this business in 1993. In mid 1995, it notified the Respondent that it was no longer able to handle this business, and it was terminating the subcontracting agreement. The Respondent then was faced with the situation, according to the testimony of Farha, that it needed to quickly hire drivers in order to perform this function itself. On August 22nd, 1995, Farha sent a memorandum to employees informing them that Dennis Strait had been named the new transportation manager, and that as of the prior Sunday, the company had taken over the Transportation Department, which prior to that had been operated by RDL, the subcontractor. In his memo he stated,

We are busy hiring drivers and other staff for this department. We still have a few positions open if you know someone that may be interested. We appreciate your patience and help during this transition period. We look forward to some very good things from our Transportation Department.

Farha also informed the employees by memo of September 20th, 1995, that

We are happy to announce that Mike Richards has accepted the Assistant Transportation Supervisor position on a permanent basis. Mike had been in this role on an interim basis. Mike comes with several years' experience in transportation and in management. Further, our Transportation Department is very close to being fully staffed. We would like to introduce them to you. Direc-

tor of Operations, Mike Hober, Transportation Manager, Dennis Strait, Assistant Transportation Supervisor, Mike Richards, Driver Trainer, Delton Hatesohn, and Transportation Clerk, Martha Thomas.

It also listed the drivers' names.

In a letter from Rita Rogers, Business Manager of the International Association of Machinists, directed to Farha, she states:

Pursuant to our conversation, I have reviewed the memo from you addressed to Mr. Albert Cook dated December 8th, 1993. I also reviewed the agreement signed by you and Mr. Albert Cook dated December 21, 1993. It is the Union's position that the agreement only allowed the company to subcontract. However, bringing bargaining unit work back in-house is still considered work under the bargaining unit recognition clause Article 2, Section 1. Further, it was agreed truckers would be paid hourly, and if there is any change in the pay, as was agreed to in the contract, the Union officials will request a meeting between the company and the Union to negotiate the difference as soon as possible.

Rogers testified in this proceeding that she had learned from Vaughn Hart, the Plant Chair, that the new drivers were being brought in, and it was the Respondent's contention that they were not to be part of the bargaining unit. Subsequently, on November 16th, 1995, Glenn Powell, the Grand Lodge Representative of the International Association of Machinists, addressed a letter to Farha. The letter stated:

By letter dated October 6, 1995, you were informed of the Union's position relative to the truck drivers employed by F & A Foods. Since that time, Rita Rogers, Business Representative, has had several discussions with you concerning the company's refusal to recognize the International Association of Machinists, District 70, as the exclusive bargaining agent for these drivers, which are a part of the current agreement between F & A Foods and the Machinists Union, District 70. By this letter, you are requested to recognize the International Association of Machinists, District Lodge 70, as the exclusive bargaining agent in accordance with the recognition provisions of our agreement. Your written response to this request will be expected no later than November 29, 1995. Thanking you for your immediate attention to this matter. I remain. Sincerely, Glenn Powell, Grand Lodge Representative.

By letter dated November 29, 1995, Farha, directed a letter to Powell stating that,

It was my understanding that about two years ago when Ryder took over our trucking operations and we no longer employed drivers, the Union no longer wished to be the representative of our drivers. During the two years of driving operations by Ryder and our subsequent resumption of using drivers at F & A, all but three of the drivers represented by the Union have left. This is, of course, much less than a majority of our original drivers. Since we basically have a new driver crew and since you have not represented them for

years, there is a question whether these new drivers are or wish to be represented by the Machinist Union. It would seem fair that we would at least give our drivers some sort of a say so or vote on this matter. If you believe this is an appropriate way to proceed, please let me know, and we can discuss how this might be accomplished.

When the Respondent had contracted with Ryder Dedicated Logistics, Inc., also known as RDL, to operate its driving operations. RDL directed its drivers and helpers with its own dispatcher/supervisor/manager who was located at the Respondent's facility. RDL continued to lease the same trucks that the Respondent had previously leased. The Union did not represent or seek to represent the drivers and helpers employees of RDL while they were employed by RDL. The subcontractor agreement with RDL was terminated, and the Respondent took over the Transportation Department, including the drivers and helpers, effective Sunday, August 30th, 1995. Before the subcontracting, during the subcontracting, and after the subcontracting, the trucks used in delivery of the Respondent's products were leased by both the Respondent and RDL from the Ryder Company in the respective periods when they performed the transportation operation.

Rita Rogers testified that in late September 1995, she had a conversation with Farha in his office and also with Vaughn Hart, the Plant Chair, who was also present for the Local, and asked if it was true that the Respondent was not going to allow the drivers and helpers to be represented by the Union, and she told Farha that the Union represented these employees. Farha responded that he was advised from his attorney that he did not have to permit the Union to represent these employees and to recognize the Union as the bargaining agent of these employees. At this point the General Counsel rested its case-in-chief.

In its case, the Respondent sought and received stipulations from the General Counsel which were received in evidence. These stipulations were that the Respondent intended to permanently close its Transportation Department in February '94 at which time, it subcontracted out the work and terminated its own operations. Further, that a majority of drivers and helpers employed by the Respondent went to work for RDL in 1994. Further, that a majority of drivers and helpers employed by RDL in August of 1995, when RDL terminated its contract, went to work for the Respondent.

The Respondent introduced four exhibits. Respondent's Exhibit 1 is a memorandum dated October 4th, 1995, to drivers (and this was after the Respondent re-established its transportation operations), from Director of Operations Mike Hober, who stated that,

I am looking forward to seeing all of you on Saturday, October 7th, at 10:00 a.m. for our first F & A drivers' meeting. This is an opportunity for the drivers to meet each other since there are several new drivers. The F & A management team will be present. They would like to meet you, and I think that it would help all of us if you knew the people that you frequently talk to on the telephone.

Exhibit 2 is a list dated June 17th, 1997, which the Respondent obtained from its files of warehouse employees

who performed helper or driver duties on various dates in 1996 and 1997. Respondent's Exhibit 3 is a list of employees in the Transportation Department prior to the Ryder subcontract and another list after the Ryder subcontract. Respondent's Exhibit 4 is a letter from the Director of Customer Logistics of RDL to President Farha stating,

This letter confirms today's conversation that Ryder Dedicated Logistics, Inc. has elected to terminate this agreement pursuant to Section 4-C of the transportation agreement dated December 15, 1993, and amended February 8th, 1995. The effective date of this termination is Saturday, August the 19th, 1995, which is 31 days from the mailing date of this letter.

#### Analysis

I find that when the Respondent restored its operation of the Transportation Department and hired employees from among the subcontractor's employees as drivers and helpers, these employees were covered by the unit description in the contract. The unit description clearly sets out that they are covered by it. There was a Board election originally, and the Union was certified to represent these employees. As the General Counsel argued, the subcontracting occurred within a single contract period, the 1993 to 1996 contract between the Union and the Respondent. During this period, the Respondent contracted out this work and then Ryder terminated the subcontract. Ryder was no longer able to do it or found it unprofitable. President Farha testified he was not sure of all the details, but those were some of the ones alluded to, and the Respondent was then put in the position of having to hire employees in order to cover its transportation operation. President Farha testified it had to hire employees to staff its transportation operation in short order, and it did so. And when it hired these employees as drivers and helpers, they were clearly covered by the unit description.

I do not subscribe to the Respondent's position that because the Union did not contest the Respondent's initial subcontracting out of this work, and did not later seek to represent employees of Ryder, that it thereby waived its rights as collective-bargaining representative and the employee's rights to be represented by the Union by reason of their original Board certification. The reason that the Union did not object to this subcontracting, as testified to by Cook, was that the contract itself permitted the Respondent to subcontract out the work. I find that the language is absolutely clear that it does permit subcontracting.

Now, whether or not the Union might have successfully filed a charge with the Board, particularly since the entire group of the Transportation Department was being contracted out, is a matter of speculation that is not before me. Certainly under the terms of the labor agreement as set out, the Respondent had the right to subcontract work, and I find that the Union's interpretation of the Respondent's having the right and its decision not to contest this right, were certainly reasonable under the circumstances, and I do not find in any way constituted a waiver of the Union's right to represent the Respondent's employees or the unit employees' right to be represented by the Union. In this regard, I note that Cook had the discussion with Farha and that Cook specifically added language to the agreement citing that he was relying on the contract, "due to the language in the contract." Now,

we could speculate as to why the Union did not take action to represent the subcontractor's employees. We could also speculate that if, in fact, it was the Respondent's position that it was amending the certification, why then did it not ask to amend the certification by agreement of the parties. Rather, it permitted that certification to remain as it was for the entire contract period, and I find that once the subcontract was terminated and the Respondent hired employees to perform the work, they were clearly covered by the unit description. The question of accretion to the unit is not the issue to be resolved in this case because clearly under the contract bar situation, this contract barred any unilateral change in that unit, and that is exactly what the Respondent is attempting to accomplish here. Well, the individual employees of the Respondent made that decision in the original election and until that decision is changed, any employees encompassed in that unit description are covered by that clause, and they were covered by the agreement at all times.

I do find particularly with respect to this question that *Ari-zona Electric Power Cooperative*, 250 NLRB 1132 (1980), cited by the General Counsel is particularly instructive and applies in this case. The Board stated in that case that the respondent violated Section 8(a)(5) and (1) of the Act finding that the respondent was not privileged here to alter unilaterally the scope of the bargaining unit during the term of a collective-bargaining agreement covering that unit and stated at 250 NLRB 1133:

it is axiomatic that parties to a collective-bargaining relationship cannot bargain meaningfully unless they know the scope of the unit for which they are to bargain. Thus, it is well established that the integrity of a bargaining unit cannot be unilaterally attacked and that once a unit is certified, it may be changed only by mutual agreement of the parties or by Board action.

All right. To the extent that accretion may be involved here, the Respondent cited *Town Ford Sales & Town Imports*, 270 NLRB 311 (1984). In that case, the Board said, that the Board has followed a restrictive policy in finding accretion because it forecloses the employees' basic right to select their bargaining representative, and that the Board will not under the guise of accretion compel a group of employees who may constitute a separate appropriate unit to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election. Now, that is not the situation that I see here. The employees here were covered by the unit description set out in the contract. However, the Board went on in that case and said that, In examining this issue the Board has identified several factors as especially important in a finding of accretion. One of these elements is the degree of interchange of employees between the affiliated company and whether the day-to-day supervision of the employees is the same in the group sought to be accreted. Now, in this case, there is evidence of some interchange of employees, and I don't believe it is a vast amount of evidence, but there is some evidence of interchange. In this regard, President Farha testified that the company is a wholesale food distributor. It has 90 employees; 20 of these employees are warehouse and maintenance employees which are unquestionably in the unit, and the other 20 are transportation employees made up of the

drivers and the helpers involved in this case. Under the method of operation utilized the Respondent receives goods from the suppliers which are carried by the suppliers' trucks and also by common carriers. These goods are then received and processed, which involves receiving and accounting for by the warehouse employees and putting them in the appropriate space, and this is generally done by the day warehouse employees, and the night warehouse employee staff generally picks from among these goods to fill customer orders and loads these on trucks. These are over-the-road trucks, long-haul, and the drivers are required to have commercial drivers' licenses. There are also two straight trucks, and the rest are regular tractor trailers. All of these trucks are leased from Ryder. They were leased from Ryder, as the stipulation set out, prior to the subcontract, during the subcontract period, and after the subcontract period. In addition to these tractor trailers, the company owns, approximately two vans which are used primarily to make local deliveries and are generally driven by the warehouse employees.

President Farha testified that subsequent to the hire of new employees in the Transportation Department in 1995, they have utilized separate budgets for the departments. Prior to the subcontracting period, they did not have a separate budget from the Warehousing Department. Also, in 1993, the drivers were hourly paid. The subcontractor paid them under an incentive program, and the Respondent has since utilized this same program. This was listed as part of the charge and complaint by the Union with respect to a change in the payment process with respect to these drivers from the terms of the original contract without bargaining. Farha testified that the Respondent's position is the Union does not represent these employees because they had signed off on this particular agreement. However, no such statement was contained in that agreement.

On cross-examination, President Farha testified that the Respondent, on occasion, uses warehouse employees to perform driver and driver helper work. The Respondent did this prior to the subcontracting period, and has done it after the subcontracting period. The method used is to poll warehouse employees. If the first one asked does not want to do it, it's generally done on a voluntary basis. There are generally 50 to 55 over-the-road routes delivered per week by the drivers in the Transportation Department. In addition to this, local routes are delivered in the van by warehouse employees. There was a director of operations before the subcontracting period and after the subcontracting period. On occasion, drivers and driver helpers have assisted in loading the trucks on the night shift which is normally done by the warehouse employees.

Mike Hober, the director of the operations the past 2-1/2 years, who has responsibility for both the Warehouse and the Transportation Departments, has a warehouse manager and a night supervisor for the warehouse and also a transportation supervisor who report to him. He testified that the day-shift employees in the warehouse are employed from 7:30 a.m. to 4:30 p.m. generally and the night-shift are employed from 4:30 p.m. to about 2 a.m. The drivers and helpers are employed Monday through Friday and start between midnight and 6 a.m. when they begin their shift until the completion of the route, depending on the route they are to take which depends on the distance of the route. He testified that the trucks should be loaded by the warehouse employees prior

to its departure. However, if the truck is not loaded, the driver is supposed to wait, and is not required to assist in the loading. He testified there are 54 scheduled routes in a week and that less than one a week are not completely loaded prior to the driver's arrival and that the driver does not assist the warehouse in loading trucks. He testified that the warehouse receives the freight, puts it away, maintains it, selects the orders, and loads the trucks. He testified that generally the warehouse employees have no interaction except when the driver returns and needs to be checked in by the warehouse employees. The role of the helpers is to go with the driver and assist the driver with unloading it at other locations, but they do not load on the Respondent's premises. There are also what are known as hotshot deliveries which are special deliveries, and warehouse employees are utilized to make some of these deliveries rather than the drivers in the Transportation Department. Generally, they poll employees to see if they have someone to do this, and this is generally done in their off time, and they are paid compensation in addition to their regular hours pay. He testified that he does not know of any drivers or helpers who help load trucks, but acknowledged that he is not there when this is done because this is done primarily at night, not during the day. He testified that the warehouse employees help the drivers clean up their trucks, which is the driver's function and the helper's function, but that the warehouse employees do, on occasion, help the drivers clean up, and that this might occur two times in a month's period. He also acknowledged that there may have been an occasional use of a warehouse employee to drive a tractor trailer to make a local delivery, and there is one warehouse employee now and have been two warehouse employees in the past who have a commercial driver's license and are able to do this. One driver's helper, Ray Lawrence, was employed in the warehouse in the fall of 1996 for a period of 2 weeks full time. This was after the Transportation Department was reopened, and he was an employee of the Transportation Department but was returned to the warehouse after the 2-week period. The vans, typically driven by warehouse employees, have been sent to Abilene, Kansas, and other out-of-town locations on a number of occasions, although this is not the regular routine. Some of the products carried by the drivers are frozen products and require refrigeration, and the drivers, while unloading their trucks, also proceed through the warehouse to the freezer and the cooler which are located under the same roof as the area where the dry goods are handled by the warehousemen. Thus, I find there is some operations interchange of the drivers, helpers, and warehouse employees. The Respondent has failed to meet its burden to challenge the unit.

In summation, the original certification included drivers and helpers. The labor agreement entered into by the parties specifically included the drivers and helpers in the unit description. That labor agreement provided for the employer to retain the right to subcontract work and when the Respondent subcontracted the work out to another employer in January 1995, the Union did not object to this. In August 1995, after the termination of the agreement between the subcontractor and the Respondent, the Respondent hired employees as drivers and helpers and once again was operating its transportation function with its own employees. In September 1996, the Union made a claim for recognition as the collective-bargaining representative of these employees in accordance with

the unit certification and as encompassed in the September 4, 1993 to September 4, 1996 labor agreement which was within the stated period of the agreement.

In this case the Union had only bargained away the right to subcontract work. However, when the employer took over the operation of its transportation function once again and hired employees to serve as drivers and helpers, they were covered by the unit description as contained in the certification and also covered by the contract. There is no evidence to support the Respondent's claim that the Union agreed to an amendment of its certification or to alter the terms of the unit description as set out in the contract. Rather the Respondent and the Union agreed to a clause permitting the employer to subcontract work and the Union did not object when the employer subcontracted the work out pursuant to that clause and did not seek to represent the employees of another employer (the subcontractor). The foregoing does not establish a waiver or an abandonment of the Union's right to represent the Respondent's drivers and helpers in accordance with the unit description and the 1993-1996 labor agreement. It is well established that a waiver of a statutory right must be clear and unmistakable. *E Systems*, 318 NLRB 1009, 1012 (1995), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). This standard applies to a union's waiver of its representation rights under a certification. *Hunt Bros. Construction*, 219 NLRB 177 fn. 1 (1975). Furthermore, as the General Counsel contends, it is the Board's established policy not to clarify the unit during the contract period in order to maintain stability in collective-bargaining relationships. *Eddison Sault Electric Co.*, 313 NLRB 753 (1994). Accordingly, I find that an analysis of the facts under the doctrines of accretion and successorship is not required in view of the existence of the unit certification and contract coverage during the course of events in this case. But see re: successor *Cablevision Systems Development Co.*, 251 NLRB 1319 (1980); enf. granted 671 F.2d 737, 739 (1982), cited by the Respondent.

The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act. The Union is and has been at all material times herein a labor organization within the meaning of Section 2(5) of the Act. The appropriate bargaining unit described above applies in this case. The Respondent violated Section 8(a)(1) and (5) of the Act as alleged in the complaint by refusing to recognize the Union on behalf of the Unit employees in the Transportation Department and by refusing to apply the contract to them and by instituting the unilateral changes in their pay from those set out in the contract. I find that these unfair labor practices in connection with the business engaged in by the Respondent have the effect of burdening commerce within the meaning of Section 2(2), (6), and (7) of the Act. Since I've found that the Respondent has violated the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative actions, including the posting of an appropriate notice designed to effectuate the purposes of the Act.

When I receive the transcript, from this proceeding, I will review my decision and may correct it or modify it and/or add case citations to this case and will then issue it in the modified form and exceptions will not begin to run until such time as I issue my formal decision in this case.

Is there anything further before I close the record in this case? All right. I will, as stated above, issue the appropriate

remedy and notice included in my decision. Hearing nothing more, the case is now closed.

(Whereupon, the proceedings adjourned at 3:05 p.m.)

#### APPENDIX B

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to recognize and bargain with District Lodge 70 of the International Association of Machinists and Aerospace Workers, AFL-CIO concerning the rates of pay, wages, hours, and terms and conditions of our employees in the following appropriate unit:

All regular full-time and regular part-time drivers, warehouse employees, fuelers, helpers, and maintenance

employees employed by F & A Food Sales, Inc. at our facility located at 2221 Lincoln, Concordia, Kansas, but excluding office clerical employees, sales employees, guards and supervisors as defined in the Act and all other employees.

WE WILL NOT fail and refuse to apply the terms of the expired September 4, 1993, to September 4, 1996 collective-bargaining agreement to our drivers and drivers helpers until we have entered into an agreement modifying the terms thereof.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union on behalf of the employees, including drivers and helpers in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL apply the terms of the expired 1993-1996 collective-bargaining agreement to the drivers and helpers until we have entered into an agreement modifying the terms thereof.

WE WILL make the drivers and drivers helpers whole for any loss of earnings and benefits they may have sustained as a result of our refusal and failure to recognize and bargain with the Union on their behalf and our repudiation of the labor agreement concerning them, with interest.

F & A FOOD SALES, INC.